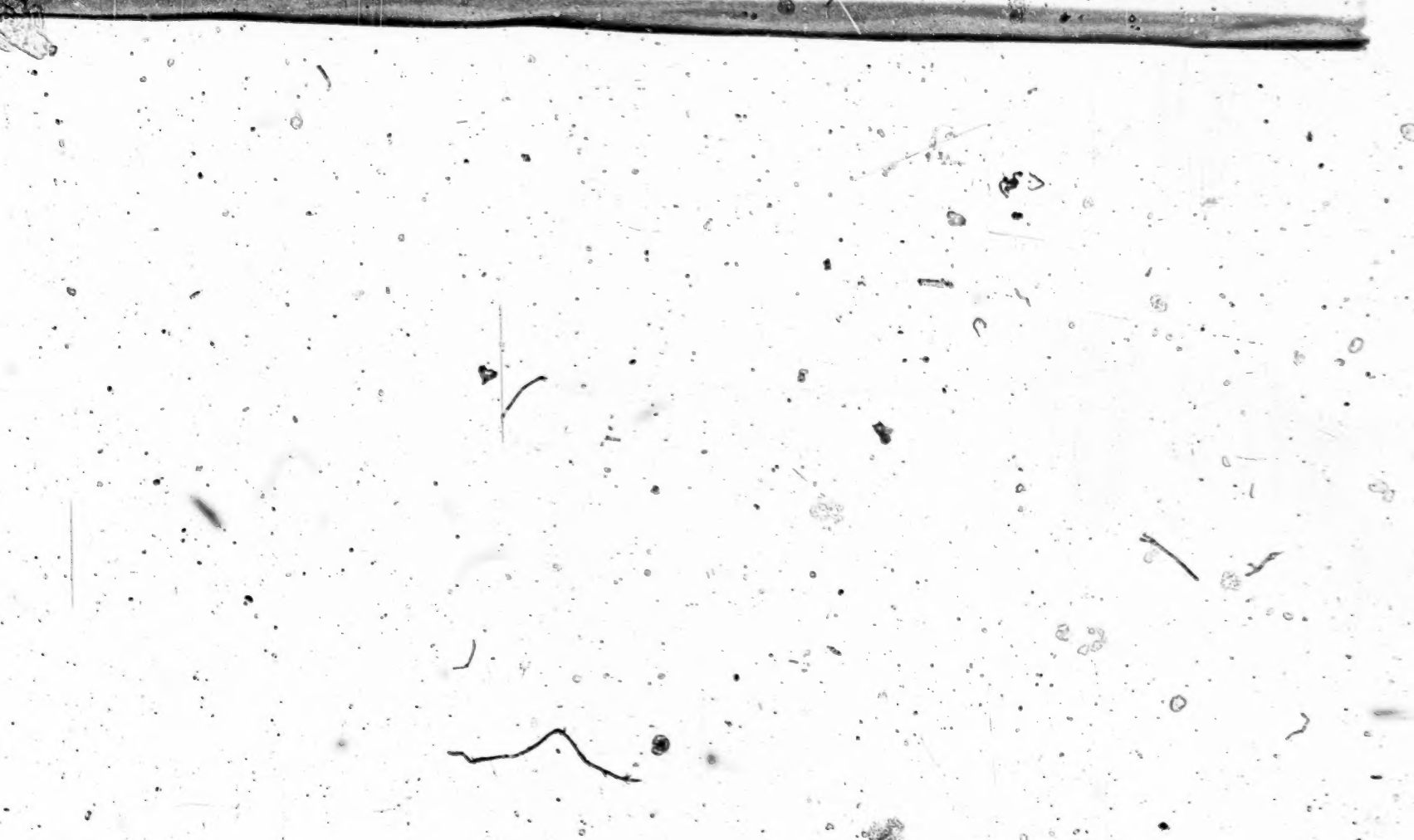

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No. 570

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN C. SHAW, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF SYDNEY C. McLOUTH, DECEASED.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the Probate Court (R. 13–16) and the Circuit Court of St. Clair County (R. 42–44) are not reported. The opinion of the Supreme Court of Michigan (R. 71–79) is reported in 290 Mich. 311.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered September 5, 1939 (R. 80). The petition for a writ of certiorari was filed

December 5, 1939, and was granted January 8, 1940. The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States by filing a claim against an estate in a state probate court subjected itself to the entry of an affirmative judgment against it on a counterclaim asserted by the estate.

STATUTES INVOLVED

The statutes pertinent to this case are Section 951 of the Revised Statutes (Act of March 3, 1797, c. 20, 1 Stat. 512, 28 U. S. C. sec. 774), dealing with credits against the United States in suits brought by it; the Tucker Act (Sections 24 and 145 of the Judicial Code, 28 U. S. C. secs. 41, 250) conferring on the United States district courts and the Court of Claims jurisdiction of claims against the United States in certain circumstances; Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929), providing for the presentation of offsets against persons filing claims against decedents' estates, and the striking of balances thereon; and Chapter 1, Sec. 20, of the Probate Code of Michigan of June 20, 1939 (Michigan Stat. Ann. August 1939 Supp., Sec. 27.3178(20)), dealing with the powers of probate judges. The relevant portions of these statutes are set out in the Appendix, *infra*, pp. 33–38.

STATEMENT

In 1918 Sydney C. McLouth entered into a contract with the United States Shipping Board Emergency Fleet Corporation, acting for and on behalf of the United States, for the construction of nine ocean-going tugs (281 Mich. 193).[1] The contract was thereafter cancelled and McLouth and the Fleet Corporation entered into a settlement agreement adjusting the damages arising out of the cancellation (281 Mich. 194). As part of the agreement the Government assumed certain of McLouth's subcontracts and commitments; this assumption was held on an earlier appeal in this proceeding to include a commitment made with the Ingram-Day Lumber Company (281 Mich. 195).

The Lumber Company subsequently obtained a judgment against McLouth for $42,789.96, with interest and costs, representing damages for breach of a contract for the furnishing of lumber to be used in the construction of the tugs (281 Mich. 196), and, after the death of McLouth, filed its claim on the judgment in the Probate Court of St. Clair County, Michigan. With accrued interest and costs to 1932 the claim was allowed in the sum of $58,089.04 (R. 71).

[1] There have been two appeals to the Supreme Court of Michigan in this case. Certain facts which we deem informative, though not necessary to the decision of this case, do not appear in the record in this case but are set forth in the opinion of the Supreme Court of Michigan on the first appeal. *In re McLouth's Estate*, 281 Mich. 191.

In 1933 the United States obtained a judgment against McLouth in a federal district court in the sum of $40,165.48 (R. 15, 72; *Shaw* v. *United States*, 75 F. (2d) 175, (C. C. A. 6th), representing damages for the conversion of certain materials belonging to the Government, which had been supplied to McLouth for the purposes of the contract (281 Mich. 196–198). Shortly thereafter the Government filed its claim on the judgment in the probate court (281 Mich. 197). The administrator and creditors of the estate sought to have the Ingram-Day judgment claim allowed as a set-off, extinguishing the Government's claim, upon the ground that the Government had assumed McLouth's commitment to the Lumber Company (281 Mich. 197). The Probate Court allowed the Government's claim and denied the set-off (281 Mich. 197), but its ruling as to the set-off was reversed on appeal. See *In re McLouth's Estate*, 281 Mich. 191.

Upon remand the administrator petitioned the Probate Court to "grant statutory judgment * * * of the existing balance due said estate (R. 11). The petition was granted and the court, finding that the Government's claim, with interest to December 8, 1937, amounted to $49,442.41 and the respondent's counterclaim to $73,071.38 (R. 14-15), "ordered, adjudged and ascertained, in accordance with Section 15682 of the Compiled Laws of the State of Michigan,[2] that United States of

[2] Section 15682 of the Compiled Laws of Michigan (1929) is set out *infra*, p. 37.

America is indebted to said estate in the sum of $23,628.97 as of December 8, 1937, and that such indebtedness be and the same is hereby allowed as and determined to be a proper claim which is owing to said estate by the United States of America" (R. 16). The judgment was affirmed on appeal by the Circuit Court for St. Clair County and by the Supreme Court of Michigan (R. 42–44, 80).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Michigan erred:

1. In holding that the Probate Court had power to enter an affirmative judgment against the United States on a counterclaim asserted by the decedent's estate.

2. In holding that by filing a claim in the Probate Court the United States consented to the entry of an affirmative judgment for the balance found to be due the decedent's estate.

3. In failing to hold that the Probate Court was without power to enter an affirmative money judgment on the counterclaim of the decedent's estate.

SUMMARY OF ARGUMENT

I

The United States did not, by filing a claim in the Probate Court, subject itself to the entry of an affirmative judgment.

A. Federal statutes and the decisions of this Court establish that the affirmative judgment was improper. Congress, by the Act of March 3, 1797,

c. 20, 1 Stat. 512, 514, and its successor legislation (R. S., Sec. 951, 28 U. S. C. sec. 774, set out *infra*, p. 35), provided for the allowance of credits against the United States for the purpose of extinguishing its claims in suits brought by it, but that statute does not allow affirmative judgments against the United States on counterclaims. *United States* v. *Eckford*, 6 Wall. 484. The Tucker Act (set out *infra*, pp. 33–37) provides for direct suit against the United States in the federal courts in certain circumstances, but it confers no consent to suit in state courts and probably cannot be used even as a basis of a counterclaim in the federal courts. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, certiorari dismissed, 234 U. S. 765.

The decision below is thus erroneous, unless the United States, by bringing suit, subjects itself to an affirmative judgment on a counterclaim in a forum in which Congress has not consented that it be sued. This Court has long held that the United States does not, by suing, consent to the entry of an affirmative judgment against it. *Reeside* v. *Walker*, 11 How. 271; *United States* v. *Eckford*, 6 Wall. 484. *The Thekla*, 266 U. S. 328, relied on below, turns on concepts peculiar to admiralty law and has no application here.

The doctrine of the *Eckford* and *Reeside* cases is sound in principle and should not be overturned. The Government's immunity from unconsented suit should extend to counterclaims even though the want of consent were derived from the silence of

Congress alone. But Congress has not remained silent. It has prescribed the forums and conditions for the presentation of claims against the Government, whether in original suits or as defensive matter. By necessary implication, Congress has made a deliberate determination that no demand outside the scope of the permissive statutes may be entertained in any forum. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

B. Whether the United States, by filing a suit in a state court, subjects itself to the entry of an affirmative judgment is a federal question. The immunity of the United States from suit without its consent is derived from the Constitution. *United States* v. *Thompson*, 98 U. S. 486, 490. Its extent in any given case is a federal question, determinable according to the intention of Congress, express or implied. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Minnesota* v. *United States*, 305 U. S. 382. And, as has been shown, the intention of Congress is clear that the United States does not by filing suit in a state court subject itself to affirmative judgment by counterclaim.

It is not suggested in the opinion below that Michigan could require the United States to surrender any portion of its immunity as a condition of access to the state courts. Such a suggestion would, of course, run counter to the principle that a State may not as the price of a privilege exact assent to a condition modifying the distribution of power between it and the federal Government. Cf. *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

ARGUMENT

I

THE UNITED STATES DID NOT BY FILING A CLAIM IN THE PROBATE COURT SUBJECT ITSELF TO THE ENTRY OF AN AFFIRMATIVE JUDGMENT

A. THE IMMUNITY OF THE UNITED STATES FROM UNCONSENTED SUIT EXTENDS TO DEMANDS FOR AFFIRMATIVE JUDGMENT ON A COUNTERCLAIM

1. *The statutes.*—The right to counterclaim for an amount in excess of the original claim of the Government cannot be derived from any act of Congress, and is plainly, though impliedly, negatived by the relevant statutes.

By the Act of March 3, 1797, c. 20, 1 Stat. 512, 514, and its successor legislation (R. S. sec. 951, 28 U. S. C., sec. 774), Congress has provided that in "suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the General Accounting Office [formerly the accounting officers of the Treasury] for its examination, and to have been by it disallowed," except that in certain enumerated circumstances presentation and disallowance is excused. By implication, it has long been held, the statute permits a credit or set-off where the conditions have been complied with (*United States* v. *Wilkins*, 6 Wheat. 135), but only to the extent necessary to extinguish the Government's claim. *United States* v. *Eckford*, 6 Wall. 484, 489.

The Tucker Act (March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. sec. 41 (20)) confers no consent to suit or counterclaim in the state courts. It certainly confers no consent to counterclaims in the federal district courts for balances which are in excess of $10,000. Indeed, even as to lesser amounts the Tucker Act "prescribes procedure inconsistent with its use as the basis of a counterclaim" in any court. *United States* v. *Nipissing Mines Company*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765.

Congress has not merely withheld its consent to affirmative judgment by counterclaim in the state courts. By providing forums and conditions agreeable to the United States, it has by clear implication determined that demands against the Government, whether by original suit or by counterclaim, may not be entertained elsewhere or on other terms. The question presented is thus whether, notwithstanding what is evidently a deliberate determination by Congress to the contrary, the United States subjects itself to an affirmative judgment on a counterclaim by bringing suit.

2. *The decisions.*—This Court has long since given its answer to the question whether, when Congress has not consented to counterclaim, the United States by bringing suit subjects itself to affirmative judgment by counterclaim.

In *Reeside* v *Walker*, 11 How. 271, the Court said (p. 290):

> To permit a demand in set-off against the government to be proceeded on to judgment

against it, would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals, by a species of reconvention, when demands in set-off are sought to be recovered, it could not be as against the government except by a mere evasion, and must be as useless in the end as it would be derogatory to judicial fairness.

In *United States* v. *Eckford*, 6 Wall. 484, the Court held that institution of suit by the United States does not constitute submission to the entry of an affirmative judgment fixing the liability of the United States. In that case the United States brought suit against the executors of Eckford on his official bond in the District Court for the Southern District of New York. He pleaded a set-off under the Act of March 3, 1797. The jury sustained the plea and certified that there was due from the United States to the defendant the sum of $20,545.00. The Court of Claims decided that the finding of the jury constituted in substance and effect a valid and binding judgment against the United States, and was conclusive and not subject to reexamination in an independent proceeding. On appeal this Court held that the Act of March 3, 1797, provided for "claim for a credit" only and not "a demand for judgment" (6 Wall. at 489). The Court discussed with approval the doctrine of *Recside* v. *Walker*, *supra*, that a demand for judgment on a set-off is the same thing as the prosecution of an independent suit which cannot be done without

the consent of the United States. The Court concluded by saying (6 Wall. at 491):

> Without extending the argument, we adopt the views expressed by this court in the case of *De Groot* v. *United States* [5 Wall. 419], decided at the last term, that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount.[2]

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[2] Accord: *De Groot* v. *United States*, 5 Wall. 419, 431; *Schaumburg* v. *United States*, 103 U. S. 667; *Illinois Cent. R. R. Co.* v. *Pub. Utilities Comm.*, 245 U. S. 493, 504, 505; *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 105–106; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765; *United States* v. *Gillies*, 144 Fed. 991 (C. C. E. D. N. Y.); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Gerding* v. *United States*, 26 C. Cls. 319; *United States* v. *Various Articles of Property*, 11 F. Supp. 992 (W. D. N. Y.); *Port Royal & A. Ry. Co.* v. *South Carolina*, 60 Fed. 552 (C. C. D. S. C.). *Cf. In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192 (C. C. A. 9th), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2d), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Navigation Co.*, 263 Fed. 410, 413 (E. D. Mo.). The state courts have uniformly held that a counterclaim cannot be made the basis of an affirmative judgment against a sovereign state. *White* v. *The Governor*, 18 Ala. 767; *Holmes* v. *The State*, 100 Ala. 291; *State* v. *Arkansas Brick Mfg. Co.*, 98 Ark. 125; *People* v. *Miles*, 56 Cal. 401; *State* v. *Royal Consolidated Min. Co.*, 187 Cal. 343, 347; *Rowan* v. *Sharps' Rifle*

There is no occasion in this case to overturn the doctrine of the *Eckford* case. A counterclaim constitutes no part of the subject matter of the original claim. The right of counterclaim is purely a creature of statute. The common law recognized neither set-off or counterclaim, but only the defense of recoupment. See *The Gloria*, 286 Fed. 188, 192. The right of set-off was first introduced by the statute of 8 Geo. II, c. 22, sec. 13.[2] The procedural device of counterclaim is an even more modern innovation. That it is the equivalent of an original claim has been the doctrine of this Court for almost a century. And, as has been shown, Congress has not remained silent on this subject. It has by legislation expressly chosen a restricted

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Mfg. Co., 29 Conn. 282; *Commonwealth* v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572; *State* v. *Leckie*, 14 La. Ann. 636, 638; *State* v. *Liberty Oil Co.*, 154 La. 267; *State* v. *Balt. & Ohio R. R. Co.*, 34 Md. 344, 374; *State* v. *Holgate*, 107 Minn. 71, 73; *Auditor General* v. *Treasurer*, 73 Mich. 28; *Auditor General* v. *Bay County*, 106 Mich. 662; *Battle* v. *Thompson*, 65 N. C. 406; *Raymond* v. *State*, 54 Miss. 562, 563; *United States* v. *Warren*, 12 Okla. 350; *Commonwealth* v. *Matlack*, 4 Dall. (Pa.) 303; *Commonwealth* v. *Philadelphia County*, 157 Pa. 531, 545; *State* v. *Corbin & Stone*, 16 S. C. 533, 543; *Moore* v. *Tate*, 87 Tenn. 725; *Bates* v. *The Republic*, 2 Texas 616; *Chevaier's Administrator* v. *The State*, 10 Texas 315. *Cf. Republic of France* v. *Pittsburg S. E. Co.*, 112 Misc. (N. Y.) 688.

[2] This statute was held not to bind the Crown. Chitty, *Prerogatives of The Crown* (1820), 366, 383; 1 Halsbury's *Laws of England* (Hailsham ed.) 25; *The Attorney-General* v. *Guy Motors, Ltd.* [1928], 2 K. B. 78; *Queen* v. *Whitehead* (1884), 1 Exch. C. R. 134, 142–3. Cf. *Raymond* v. *State*, 54 Miss. 562.

forum and prescribed conditions agreeable to the Government. Admittedly the respondent's counterclaim is not a suit or claim for credit within the meaning of that legislation. By necessary implication Congress has declared that the United States cannot be subjected to the judgment entered on the respondent's counterclaim.

The court below deemed statutory consent unnecessary for the reason that the United States had impliedly waived its immunity by submitting its claim for the adjudication of the probate court. The court recognized "some seeming conflict in federal decisions" but purported to follow "the more recent federal decisions" (R. 75-76), which it conceived to formulate a rule of sovereign liability.

Principal reliance was placed upon *The Thekla*, 266 U. S. 328. In that case, the Luckenbach Company filed a libel *in rem* against *The Thekla* for a collision with the *F. J. Luckenbach*. The owners of *The Thekla* gave a stipulation for value, answered the libel, and filed a cross libel against the *F. J. Luckenbach*. Shortly thereafter the claimants of *The Thekla* filed a motion to stay proceedings under the original libel until security should be given to respond to the cross libel, which motion was granted. The United States, which operated the *F. J. Luckenbach* under charter, thereafter claimed ownership and possession and on its own motion was made the party libellant. Thereupon the United States Shipping Board Emergency

Fleet Corporation in order to lift the stay, filed a stipulation to respond in damages to the cross libel. A decree for damages, interest, and costs against the United States was approved by the Court.[4]

The decision, as the opinion of Mr. Justice Holmes makes clear, was rested on the peculiar admiralty conception that "the subject matter" of the action "is the collision, rather than the vessel first libelled" (266 U. S. at 340). The Court expressly disclaimed any intention to "qualify * * * in any way" the decisions cited by the Government holding that a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim (*id.*, p. 339). Indeed, in *Nassau Smelting Works* v. *United States*, 266 U. S. 101, referred to in the opinion in *The Thekla* and decided but two weeks before, this Court observed (p. 106):

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

The prize cases are even more remote. In *The Nuestra Senora de Regla*, 108 U. S. 92, the United States during the Civil War seized a Spanish vessel not subject to capture and, after a long delay,

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[4] The question does not appear to have been presented to or considered by the court whether the Act of March 3, 1797 (*supra*, p. 8), was applicable to the cross libel.

filed a libel of information in prize in a district court. The owner filed a claim. A decree was entered directing that the vessel be restored to the owner but reserving all questions of damages and costs pending consideration and adjustment by the Governments of the United States and Spain. After several years of negotiations the State Department agreed to submit the questions to the court to obtain such further "relief as justice demanded, and in the mode that tribunal should deem most proper and convenient." This Court held that a decree should be entered against the United States for the value of the vessel, and damages for the delay in proceeding to adjudication, together with interest from the date of the decree.

The Court was of the view that the executive had voluntarily submitted the cause for the express purpose of having a judicial determination according to the rules applicable to private persons in like cases. To the objection that the executive branch of the Government was without authority to make such submission, the Court observed that "It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication." (108 U. S. at 102.) The decision thus appears to rest on a special doctrine of international law in prize cases and the authority of the executive in such cases to consent to suit. The facts in *The Paquete Habana*, 189 U. S. 453 were substantially the same, except that there had

been no diplomatic negotiations with a foreign government.[5] See Note, 36 Harv. L. Rev. 871, 873.

There is a suggestion in the opinion below that the order of the Probate Court, although a "final determination of the rights of the litigants" (R. 78), constituted no more than a mere "ascertainment" approved by this Court in the *Eckford* case. By "ascertainment" this Court obviously meant a mere statement of opinion in passing, not purporting to be a binding adjudication. But under the Michigan law, the order of the Probate Court is not subject to collateral attack (*Calhoun* v. *Cracknell*; 202 Mich. 430; *Burgess* v. *Stribling*, 134 Mich. 33, 37; *Heap* v. *Heap*, 258 Mich. 250, 259; *McDannel* v. *Black*, 270 Mich. 305, 310). And since the question of the Probate Court's jurisdiction to enter the order has been raised and litigated in this case, the order would presumably have to be given the effect of *res judicata* in an independent proceeding, which is precisely what this Court held could not be done in the *Eckford* case. It is, therefore, immaterial what methods are ordinarily available for the enforcement of the orders of the Probate Court. It may be noted, however, that such orders may be enforced against private persons by process of the Probate Court, either by contempt proceedings or,

[5] The court below also relied upon dicta in *American Propeller Co.* v. *United States*, 300 U. S. 475, 478, and *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134. In each case the Court was reasoning from broad analogy and had no occasion to refine its statement of the rule of *The Thekla*.

at least since September 29, 1939, by execution. Michigan Compiled Laws of 1939, Sec. 15520; Michigan Statutes Ann. August 1929, Supp. Sec. 27.3178 (20); *In re Merrill,* 200 Mich. 244. Moreover, the Supreme Court of Michigan in affirming the order of the Probate Court, directed that the respondent recover costs from the United States and that he "have execution therefor" (R. 20).

The distinction between a judgment and a so-called "ascertainment" is determinative whether Congress will reexamine the merits of the claim which is the subject of a judicial pronouncement. The Act of March 3, 1863, c. 92, 12 Stat. 765, which was the first grant of authority to the Court of Claims to render final judgments, contained a provision (Sec. 14) "that no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." Because of this provision, this Court held that it was without power to review determinations of the Court of Claims. *Gordon* v. *United States,* 2 Wall. 561, 117 U. S. 698 (opinion of Chief Justice Taney). Section 14 was thereafter repealed (c. 19, 14 Stat. 9) and there has never been any doubt since that the judgments of the Court of Claims, if no review is obtained, or of this Court on review, are "absolutely final and conclusive of the rights of the parties", *Williams* v. *United States,* 289 U. S. 553, 564. All judgments against the United States are now paid by appropriations pursuant to estimates

prepared by the Bureau of the Budget for the congressional committees on appropriations under the Act of April 27, 1904, c. 1630, 33 Stat. 394, 422; 31 U. S. C. sec. 583 (2). See also 31 U. S. C. secs. 225–6. The paucity of cases in which the Congress has sought to re-examine the merits of claims finally adjudicated in the Court of Claims (see e. g., *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447; *Ex parte Pocono Assembly Hotels Co.*, 285 U. S. 526 (motion for leave to file petition for writ of mandamus and/or prohibition denied)) attests the unity of theory and practice.

So far as can be determined, on the other hand, Congress has considered that a mere "ascertainment," as distinguished from a judgment, does not obligate the Government to pay a claim without re-examination of its merits. Such was the view of the House Judiciary Committee in 1844 with respect to a claim founded upon the certificate of the jury in the *Reeside* case. The committee rejected the contention that the jury's certificate evidenced a "debt of record", observed that no court had power to enter an affirmative judgment against the United States, and recommended that the claim should not be repaid without consideration of its merits. House Report No. 163, 28th Cong., 1st Sess. (1843–1844).[6]

[6] The relevant portions of this report are set forth in the Appendix, *infra*, pp. 33–39.

3. *The considerations of policy.*—The "historic" or "metaphysical" foundations of the doctrine of sovereign immunity from suit are of only "academic" interest at this date. Cf. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 388. The survival of the rule in modern times springs from the recognition that "there may be sound reasons of public policy why a state should be immune from the harassment of litigation in forums and under conditions not agreeable to the state." See *The Gloria*, 286 Fed. 188, 194. Cf. *Minnesota v. United States*, 305 U. S. 382, 388. Moreover, immunity from suit today affords an appropriate and convenient basis for designating the types of claims which the United States is willing to have litigated against it, as is done in the Tucker Act.

When the United States sues, the historic common law defense of recoupment, which is limited to cross-demands arising out of the same transaction from which the main suit stems, may be asserted without increasing the burden of the Government, and should be allowed in order to prevent recovery where in fact no debt is owing. Cf. *Bull v. United States*, 295 U. S. 247, 261. Whether, in the absence of statutory authority, the defendant should be permitted to set off claims arising out of matters not related to the main action, is a far

more doubtful question, but is not presented here. It is the Government's position that in any event the substantial considerations of policy which underlie the immunity of the United States from original suit apply with equal force to any affirmative judgment entered on a defendant's counterclaim.

Congress designated in the Tucker Act the forums in which it was willing that the United States be sued, and the types of claims which it was willing to have litigated against the Government. That the Congress intended to consent to original suits alone and to withhold consent to counterclaims appears from the fact that the statute "prescribes procedure inconsistent with its use as the basis of a counter claim." *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765. The divergencies which Congress prescribed for procedure under the Tucker Act or in the Court of Claims from that followed elsewhere indicate, moreover, its judgment that ordinary procedure would not adequately protect the Government. Congress expressly provided that all cases under the Tucker Act should be tried without a jury. Act of March 3, 1887, Sec. 2, c. 359, 24 Stat. 505; 28 U. S. C. sec. 41 (20). It prescribed a six-year period of limitations for all suits against the United States under the Tucker Act. *Ibid.*; 28 U. S. C. sec. 262. The United States enjoys a further important advantage under the provision of the Tucker Act authorizing the Court

of Claims to grant the Government a new trial at any time within two years after judgment upon production of evidence of "fraud, wrong, or injustice". 28 U. S. C. sec. 282.[8a]

The Tucker Act confers jurisdiction on the Court of Claims of claims against the United States of enumerated types, and concurrent jurisdiction on the federal district courts of such claims not exceeding $10,000. Congress gave no consent whatever to suit in the state courts. The omission from the Tucker Act of consent to be sued in state courts is sufficient evidence of an intention that the Government should not be subject to suit there. The reason for the omission is not expressly revealed in the legislative history but it may have been doubtful whether the United States could obtain equal justice in state courts, where judges or juries might well have felt that the vast resources of the federal Government, gathered largely from other regions, pointed toward generosity to plaintiffs. Cf. *United States* v. *Thompson*, 98 U. S. 486, 491. It may be observed in this connection that Congress limited the jurisdiction of the federal district courts under the Tucker

[8a] With respect to this provision it has been observed: "Special safeguards against fraudulent claims are certainly justifiable. The Government is more exposed to fraud than an individual; and the public interest which is the interest of nobody in particular, may justly claim the special protection of the law to counterbalance the natural watchfulness with which private interests are guarded." (Freund, *Private Claims Against the State*, 8 Pol. Sci. Q. 625, 631.)

Act to claims not exceeding $10,000, and this limitation would seem to forbid the entry of an affirmative judgment in excess of that amount, even on the assumption, which we believe to be erroneous, that the district courts have power under the Tucker Act to entertain counterclaims. Cf. *Nassau Smelting Works* v. *United States*, 266 U. S. 101; see *North Dakota-Montana Wheat Growers' Association* v. *United States*, 66 F. (2d) 573 (C. C. A. 8th), certiorari denied, 291 U. S. 672. But if the decision of the court below is upheld the state courts, by strange paradox, will enjoy a more extensive authority to entertain counterclaims against the United States than that possessed by the federal courts. For if a state court may entertain a counterclaim at all, there is no legal basis for limiting the amount of the affirmative judgment which it may enter.

To sustain the decision below would not merely lead to an incongruous result. It would defeat the policy and purpose of Congress expressly embodied in the Tucker Act that large claims against the United States should be litigated at the seat of the Government. As to all claims in excess of $10,000 Congress apparently deemed it desirable to establish a special tribunal "trained in the consideration of intricate problems involved in such determinations". See *United States* v. *Skinner & Eddy Corp.*, 35 F. (2d) 889, 901 (C. C. A. 9th). Even more important was the purpose to prevent the great inconvenience and public detriment which

would result if Government officers were required to defend or aid in the defense of suits at points remote from the capital. Cf. *Davis* v. *West Virginia Bridge Commission*, 113 W. Va. 110; *Greene* v. *Wolf*, 175 Ky. 58, 61–62. That the jurisdiction of the district courts was limited for the purpose of protecting the United States, notwithstanding the acknowledged inconvenience to private claimants, appears from the following statements in the debates on the Tucker Act in the House (18 Cong. Rec. 624):

> Mr. BRECKINRIDGE, of Kentucky. Why is it that in the first section of the bill the jurisdiction of the circuit and district courts of the United States is limited to such sums as do not exceed $10,000? Why is it that jurisdiction should not be made so all claims should be filed in the circuit and district courts?
>
> Mr. TUCKER. Upon full consideration by the committee, it was thought where a claim exceeded $10,000 it would be better and safer for the Government it should be where the head of the Department may be present to protect the Government.
>
> Mr. BRECKINRIDGE, of Kentucky. That throws on the Court of Claims the entire business—a glut of cases—including the $15,000,000 of Indian claims—all claims exceeding $10,000. In the second place, if the gentleman allows me, I will make the suggestion it takes a claimant far away from his

home, and before a court which must be very much crowded with business.

Mr. TUCKER. My friend from Kentucky will remember this bill is in relief of claimants. If the claims are under $10,000 he has to come there to-day.

Mr. BRECKINRIDGE, of Kentucky. I think as far as it has gone it is in the right direction. I wish to see if we cannot get it to go further than it does.

Mr. TUCKER. We tried to make a fair compromise.

Most of the states which have consented to suit have likewise prescribed a forum at the seat of the Government. The states of Alabama, Illinois, Michigan, New York, and Utah have established a court or board of claims holding its sessions at the capital. Others, including California, Indiana, Massachusetts, Mississippi, Nebraska, Virginia, Washington, West Virginia, and Wisconsin, have consented to be sued in a court of ordinary jurisdiction but have either expressly limited jurisdiction to the court of the county in which the seat of the Government is located, or authorized a change

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[7] Cumulative Supplement to the Code of Alabama, 1936, Sec. 2992(26) *et seq.*; Jones, *Illinois Statutes Annotated*, Vol. 27, Sec. 126.057 *et seq.*; Mich Stats. Ann., Sec. 3.451; New York's Code of Civil Procedure, Secs. 263 *et seq.*; Revised Statutes of Utah, 1933, Title 26, Sec. 26–0–1.

of venue to that county on motion of the Attorney General.[8] The reason for the limitation of the forum in the state statutes is to avoid the interference with the conduct of public affairs which might result if Government officers were required to leave the capital to defend or testify in suits against the state. *Davis* v. *West Virginia Bridge Commission, supra; Greene* v. *Wolf, supra.*

The policy of the Tucker Act with respect to the choice of forum in the case of original suits for more than $10,000 applies as well to counterclaims for more than $10,000 in excess of the Government's claim.[9] Congress evidently contemplated that suits

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[8] Deering, *Political Code of California*, 1937, Sec. 688; Burns, *Indiana Statutes Annotated*, 1933, Sec. 4–1501; Annotated Laws of Massachusetts, 1933, Vol. 9, c. 258; Mississippi Code of 1930, Sec. 5997; Compiled Statutes of Nebraska, 1922, Sec. 1105, 1107, 1110; Virginia Code of 1930, Sec. 2578; Remington, *Revised Statutes of Washington Annotated*, 1932, Vol. 3, c. 4, Sec. 886; W. Va. Code, 1931, c. 14, Art. 2, Sec. 1; Wisconsin Statutes, 285.01.

[9] It may be doubted whether the estate's indebtedness to the United States in this case arose out of the same transaction on which the counterclaim was based. See *supra*, pp. 21–22; cf. *New York* v. *Dennison*, 84 N. Y. 272. At all events, the Government's claim had been reduced to judgment at the time it was filed in the probate court and the original claim was thus merged in the judgment. The claim of the estate on the contract was therefore technically unrelated to the judgment claim.

for relatively small amounts would not require the attendance of important Government officials and evidently concluded that the inconvenience to the United States in such cases was outweighed by the advantages to the private claimant. But it is clear that Congress deemed the presence of the department heads, and their staffs at the seat of government, essential for the protection of the United States where large demands are involved.

The question must also be viewed with reference to the Attorney General's responsibility for the conduct of the Government's litigation. In 1868 the solicitors of the Court of Claims were placed under the jurisdiction of the Attorney General in order to secure the best representation of the Government. See Congressional Globe, 40th Cong., 1st Sess., pp. 367–8; *id.*, 40th Cong., 2nd Sess., pp. 2764–2768. It is true that since 1870 the district attorneys have been subject to the supervision and control of the Attorney General. But this authority cannot be exercised minutely and may be insufficient to protect the Government's interest in civil litigation involving large amounts and complicated issues.

The present case suggests also questions which may arise if it is held that, by instituting suit on one claim, the United States subjects itself to counterclaims on unrelated matters, including those concerning Government departments or agencies having no direct interest in the original action.

See footnote 9, p. 25.

The Government cannot realistically be assimilated to a single individual for purposes of litigation. If counterclaims may be filed without regard to the limitations prescribed by Congress, it would be difficult to investigate in advance of filing suit what counterclaims might be made affecting the particular department interested in the original action; it would obviously be impossible to make such investigation in every branch of the federal Government. The Government would not be able to take a voluntary nonsuit after the filing of a counterclaim in the federal courts (Rules of Civil Procedure, 41 (a)) and probably would have no absolute right to do so in any state court. Cf. *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 148. While there is no policy that the United States should be permitted to defeat its just obligations, there is substantial reason why the Government should be able to prescribe the forum for the determination of its obligations.

It is unnecessary to inquire in this case whether these considerations require the conclusion that the right to set-off as well as to counterclaim should be denied in the absence of statutory consent. Having complied with the Act of 1797 (R. S., Sec. 951), the respondent was entitled to a set-off up to the amount of the Government's claim. *United States* v. *Wilkins*, 6 Wheat. 135. It has sometimes been urged that even in the absence of statutory consent set-offs should be allowed to the extent necessary to

prevent recovery by the Government for more than is justly owing. But a stay of execution until the defendant could sue on its claim under the Tucker Act would be sufficient to avoid injustice. In any event it is certainly unnecessary to render an affirmative judgment against the Government in order to permit the defendant to make a complete defense. The opinion in *The Gloria* case, it is true, suggests that set-off and counterclaim stand on the same footing, for the reason that a consideration of the merits of a set-off requires a determination whether the United States is indebted to the defendant and that there is therefore no reason why the court should not proceed to enter an affirmative judgment. At best this is an argument of convenience to avoid multiplicity of suit. Such considerations should be entitled to little weight where the Congress has prescribed the forum in which liability may be finally determined. The possible inconvenience to the private litigant was considered by the Congress and found to be an insufficient reason for permitting suit in any court other than the Court of Claims where the demand is in excess of $10,000.

B. THE STATE COURTS ARE WITHOUT AUTHORITY TO ENTER AN AFFIRMATIVE JUDGMENT AGAINST THE UNITED STATES

1. Whether the immunity of the United States from suit without its consent derives from the sovereign status conferred upon the federal Gov-

ernment by the Constitution, or from some other source in that instrument, it is plain that it does have a constitutional origin and is beyond state interference. *United States* v. *Thompson*, 98 U. S. 486, 489, 490. *Monaco* v. *Mississippi*, 292 U. S. 313, 321; *Kansas* v. *United States*, 204 U. S. 331, 342. And whether the immunity of the United States or its instrumentality has been waived in a given case, and if so to what extent, is a federal question, determinable according to congressional intent, express or implied. *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Minnesota* v. *United States*, 305 U. S. 382; *Buchanan* v. *Alexander*, 4 How. 20. Undoubtedly the same rule applies in determining the extent of the immunity. Compare *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21. Accordingly, it is immaterial that this case comes up through the state courts. There is, indeed, no suggestion in the opinion of the court below that it was deciding a state rather than a federal question.

There can be little doubt of the constitutional immunity of the United States from suit in the absence of consent. *Minnesota* v. *United States*, 305 U. S. 382, 388–389; *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *Carr* v. *United States*, 98 U. S. 433, 437; *Buchanan* v. *Alexander*, 4 How. 20. Whether, in the silence of Congress, the Government's immunity extends to counterclaims is a question not presented in this case. The lack of consent to suit is

not founded on the silence of Congress alone. Congress, as we have sought to show, has prescribed the conditions and limits of the liability of the United States to suit and by clear implication declared its immunity from demands for affirmative judgments on counterclaims. Its constitutional power to do so would seem clear. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21. The reasonableness of the Congressional determination is sufficiently evidenced by almost a century of judicial precedents.

2. The court below proceeded on the view that the immunity of the United States under the decisions of this Court extends only to original suits and not to counterclaims. There appears to be no suggestion in the opinion below and certainly none in the brief of the respondent that the Government, though otherwise free from unconsented suit on counterclaims, can be required to surrender its immunity as a condition of access to the state courts. Any such suggestion, it seems plain, would be untenable. The State of Michigan has not purported to withdraw from its probate courts jurisdiction to determine all claims against a decedent's estate. And the state probate court must give effect to any right arising under the federal Constitution when asserted in a proceeding within its general jurisdiction. Cf. *Davis* v. *Corona Coal Co.*, 265 U. S. 219, 222–223; *Fauntleroy* v. *Lum*, 210 U. S. 230. The Government's constitutional immunity from suit, like its exemption from the operation

of state statutes of limitations, must therefore be enforced by the state courts. This duty it cannot escape by the pretext of denying jurisdiction to enforce a federal right. *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 415; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230. There would seem to be no occasion, therefore, to consider what requirements the State may lawfully impose as the condition of granting a privilege which the State is free to withhold.

The conclusion would be the same in this case, however, even though the State of Michigan were free to deny the United States access to the courts of the State. A State may not exact as the price of a privilege assent to a condition modifying the distribution of power in the federal system prescribed by the Constitution. Cf. *Terral* v. *Burke Construction Co.*, 257 U. S. 529. To be sure, the immunity here asserted, like many others in the field of governmental relations, may be waived by express consent. But the Congress has withheld its consent in this case. The Attorney General likewise refused consent and, indeed, had no authority to do otherwise. *Stanley* v. *Schwalby*, 162 U. S. 255, 270.

It should be observed moreover that the filing of the claim in the probate court by no means represented a voluntary choice of forum even by the Department of Justice. The state court was the only forum open to the Government. This Court so held in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, naturally assuming that

the constitutional rights of the United States would be as fully protected in the state courts as in the courts of the Union. See 296 U. S. at 479.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Michigan should be reversed.

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APPENDIX

Section 951 of the Revised Statutes (Act of March 3, 1797, c. 20, 1 Stat. 512; 28 U. S. C. sec. 774) provides:

> In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

The Tucker Act, Section 24 of the Judicial Code, 28 U. S. C. sec. 41, provides:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> (20) *Suits against United States.*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court

of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

The Tucker Act, Section 145 of the Judicial Code, 28 U. S. C. sec. 250, provides:

Jurisdiction.—The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

(2) *Set-offs.*—Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall

have been rendered and finally acted upon as required by law, unless the General Accounting Office fails to act finally thereon within six months after the account is received in said office.

Section 146 of the Judicial Code, 28 U. S. C. sec. 252, provides:

> *Judgments for set-off or counterclaims.*— Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.

Section 15682 of Chapter 266 of the Compiled Laws of Michigan (1929) provides:

> Set-offs in settlement of claims. Sec. 9. When a creditor against whom the deceased had claims shall present a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance against or in favor of the estate, as they shall find the same to be; but no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate, as a set-off or otherwise.

Chapter I, Sec. 20, of the Probate Code of Michigan of June 20, 1939 (Michigan Stat. Ann., August 1939 pamphlet, Sec. 27.3178 (20)), provides:

* * * * *

Sec. 20. Each judge of probate shall have power:

1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

2. To issue all executions, and to issue all warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of this state, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this state, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate; service and enforcement of the executions mentioned in this chapter and the return thereof shall be had in accordance with the law applicable in courts of record;

3. To keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court;

4. And he shall have such other powers as may be conferred by law.

House Report No. 163, 28th Congress, 1st Session (1843–1844):

The very learned and able judge who presided at the trial of the cause sustains the position here taken by the committee, in the conclusion of his written opinion overruling the motion for a new trial. He remarks: "If the verdict be affirmed, it will only be operative, in law, as a judgment for the defendant to preclude the United States from afterwards claiming a balance; but the court can take no further steps to enforce the payment of the balance found due by them, as they could do in a similar case between individuals. The defendant must appeal to another tribunal for ultimate redress, where the whole merits of his claim may be reexamined. Whether it will or ought to be done, does not comport with my duty; but, inasmuch as Congress may act on this subject, according to their own discretion, it is evident the time may be very distant when this controversy may be terminated."

The 4th section of the act of Congress, approved March 3, 1797, gives to all defendants in suits brought by the United States a right to claim, against the demand for which the action has been brought, any credits to which they shall prove themselves entitled, if they have been presented to, and rejected by, the proper accounting officer of the Treasury Department.

This provision, however, has no other object than to secure to the defendant, under the pleas of payment and set-off, the admission in evidence of his credits to the jury in support of the issue, and to establish his right to a general verdict in his favor; but does not authorize the jury to go further, and declare the defendant to be a creditor of the Government, and so to ascertain and

"certify" the balance that, in law, it shall be binding, and *"shall be deemed a debt of record."*

The United States may happen, in many cases, to be a debtor to the defendant, upon the final adjustment of complicated accounts; but it will require the enactment of a law of Congress to give authority to a jury to place the Government in that predicament, and by their verdict, or by any declaration of opinion accompanying their verdict, to afford evidence of the amount of the debt, so that it can receive the sanction of a judicial judgment, and be established as an incontrovertible or final *"debt of record."* [Emphasis supplied.]

Your committee have not been furnished with any account by the memorialist, nor with any statement of the grounds or facts assumed by the jury, from which they drew the conclusion that the Government was indebted to her late husband in the large amount mentioned in the certificate which was returned with their verdict. The memorialist appears to rely, for the validity and payment of her claim, entirely upon the alleged legal effect of that certificate. But, inasmuch as the committee view the certificate of the jury as extraneous and unauthorized by any law, it affords no evidence of a debt of record against the United States; and, as the judgment rendered on the verdict merely bars the Government from any further demand upon the estate of James Reeside, the claim of the memorialist remains open to be reexamined and adjusted, either by the proper department of the Government, or by an appropriate committee of the House of Representatives.

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